

ORIGINAL

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of )  
)  
Amendment of Section 73.202(b), )  
Table of Allotments, )  
FM Broadcast Stations. )  
(Detroit, Howe and Jacksboro, )  
Texas, Antlers and Hugo, Oklahoma )

MM Docket No. 97-26  
RM-8968  
RM-9089  
RM-9090

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
Amendment of Section 73.202(b), )  
Table of Allotments, )  
FM Broadcast Stations. )  
(Lewisville, Gainesville, Robinson, )  
Corsicana, Jacksboro, and Mineral )  
Wells, Texas) )

MM Docket No. 97-91  
RM-8854  
RM-9221

To: Mass Media Bureau

**OPPOSITION TO PETITION FOR PARTIAL RECONSIDERATION**

Jerry Snyder and Associates, Inc. ("Snyder"), by its counsel, hereby respectfully submits its Opposition to the Petition for Partial Reconsideration (the "Petition") filed by Heftel Broadcasting Corporation ("Heftel"), in the above-captioned rulemaking proceeding. In regard thereto it is stated as follows:

**I. Heftel's Allegation That "Changed Circumstances" Justify Heftel's Filing of the Petition is Specious.**

Heftel indulges in a charade by casting the Petition as one necessary because of "changed circumstances." In fact, the Petition is merely a facade to correct Heftel's fatal procedural errors,

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which Heftel had to know would be the subject of applications for review<sup>1</sup> of the *Report and Order*, DA 98-1650 (released August 21, 1998) (the "Order").

Ostensibly, the Petition is necessitated because the *Order* did not delete the C1 assignment on Channel 240C1 at Mineral Wells, Texas, as proposed in Heftel's Petition for Rulemaking in MM Docket No. 97-91. However, in Joint Reply Comments filed on February 12, 1998, in MM Docket No. 97-91 at p. 4, Heftel urged that the proposal Snyder and Heftel submitted:

. . . be approved as in the public interest permitting the Channel 240C1 allotment to Mineral Wells to be retained, but at a new reference point and the proceeding in Docket No. 97-91 be modified accordingly.

Thus, in the Petition, Heftel is complaining that the *Order* largely did that which Heftel requested that the Commission do. Surely Heftel should not now be heard to complain that the result of the relief Heftel requested in the Joint Reply Comments to retain C1 service at Mineral Wells were consequences that Heftel did not envision when it entered into the Agreement.

**II. The Petition in Reality Requests a Nunc Pro Tunc Correction of a Fatal Procedural Error in Heftel's Petition for Rulemaking.**

It is obvious from the Petition that because there are no "changed circumstances" to justify its filing Heftel must have another motive. Heftel knew from numerous pleadings filed by Snyder and Metro that an application for review would raise procedural deficiencies in Heftel's Petition for Rulemaking in this proceeding. The simplest way for Heftel to avoid Commission consideration of these deficiencies in adjudicating the application for review was to correct them

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<sup>1</sup>On September 21, 1998, Snyder filed an Application for Review and on September 24, 1998, Metro Broadcasters-Texas, Inc. ("Metro") also timely filed an application for review which raised matters frequently argued in the rulemaking process.

by grant of the Petition. Section 1.104(c) of the Commission's rules provides that if both an application for review and a petition for reconsideration are filed in the same proceeding the petition for reconsideration would be considered first. Thus Heftel's Petition is nothing more than an attempt to moot many of the issues that Heftel had to know Snyder and Metro would raise in an application for review.

For example, in Heftel's Petition for Rulemaking, Heftel never requested that the reference point for the C1 allotment to Mineral Wells be changed from that specified in the FCC's rules<sup>2</sup> of N.L. 32-41-06; W.L. 98-09-32 to the present site of Snyder's station KYXS(FM), as Heftel now does at p. 9, n. 7 of the Petition.

As both Snyder and Metro had argued in Motions to Dismiss and in Comments and Reply comments in this proceeding, Section 73.207(a) of the FCC's rules states, "The Commission will not accept petitions to amend the Table of Allotments unless the reference points meet all of the minimum distance separation requirements of this section." The *Order* completely ignored Snyder's and Metro's arguments in this regard. Now in the Petition at n. 7 Heftel belatedly tries to correct its violation of Section 73.207(a) and uses the Petition as a vehicle to prevent future Commission consideration of Snyder and Metro's appeal on this issue.<sup>3</sup>

When Heftel filed its Petition for Rulemaking on July 26, 1996, that Petition reflected Heftel's belief that Snyder had no interest in pursuing the Mineral Wells C1 allotment. That assumption was not true and Heftel made no effort to contact Snyder regarding the Petition for

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<sup>2</sup>*FM Allotments: (Mineral Wells)*, 7 FCC Rcd. 1791, n. 3 (1992).

<sup>3</sup>Failure to fully comply with the spacing requirements of Section 73.207 of the Commissions rules in a petition for rulemaking is a fatal flaw that requires dismissal of the Petition, *FM Allotments (Chester and Wedgefield, South Carolina)*, 5 FCC 5572 (1990).

Rulemaking to confirm the truth of this allegation until months after the filing (see attached) despite the requirements of Section 1.401(d) of the FCC's rules.<sup>4</sup>

Finally, Heftel's newly raised argument at pp. 7-8 of its Petition that the Commission should decide that Heftel's proposal is superior based solely on comparative population served is clearly contrary to Commission policy. See, *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd. 7094, 7096 ¶ 14 (1990).

### III. CONCLUSION.

Heftel's Petition is not based on a "change of circumstances" due to the expiration of the Agreement, because that Agreement expired on its own terms on August 21, 1998, in the manner the Agreement was designed to do. Rather, Heftel's Petition is clearly an attempt to use the provisions of Section 1.104(c) of the FCC's rules to cover up numerous procedural errors in this proceeding before they are considered in the Application for Review.

For the reasons given above, the Petition for Partial Reconsideration should be denied.

Respectfully submitted,

**JERRY SNYDER AND ASSOCIATES, INC.**

By: 

Robert W. Healy  
Its Counsel

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<sup>4</sup>See, *FM Tables (San Isabel)*, 2 FCC Rcd. 3454 ¶ 3 (Chief, Policy and Rules Division 1987).

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October 5, 1998

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ADMITTED IN VA & D.C.

October 7, 1996

OUR FILE NO.  
0803-106-60

**VIA SCHEDULED EXPRESS**

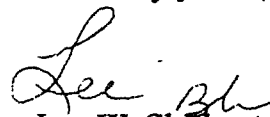
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RE: MM Docket 96-10  
Gainesville, Lewisville, Corsicana,  
Robinson, Jacksboro and  
Mineral Wells, TX

Dear Bob:

It has been brought to my attention that I failed to serve you with a copy of the enclosed Petition for Rule Making and Supplemental Comments which we filed on July 26 and 29, 1996, in the above-referenced rulemaking proceeding.

Sincerely yours,

  
Lee W. Shubert

Enclosures (2)

LWS/blr

**CERTIFICATE OF SERVICE**

I, Angela Y. Powell, a paralegal in the law firm of Smithwick & Belendiuk, P.C., hereby certify that on this the 5th day of October, 1998, copies of the foregoing were mailed first-class, postage prepaid, to the following:

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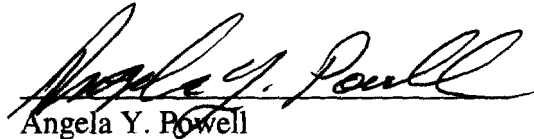
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